Supreme Court U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALUMINUM COMPANY OF AMERICA,
Petitioner,

v.

ESTHER JONES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY C. BUFFALOW *
THOMAS J. WOODFORD
MILLER, HAMILTON, SNIDER & ODOM LLC
254 State Street
P.O. Box 46
Mobile, Alabama 36603
(334) 432-1414
Attorneys for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether Due Process, and a practical rather than technical construction of the Longshore Act, requires review of certain remand orders in which there is a conclusive determination of an important legal issue or legal standard, such as jurisdiction, or in which the Benefits Review Board has exceeded its statutorily defined powers of review?

2. Whether a remand label is dispositive, so that the Benefits Review Board may effectively preclude Petitioner's right of appeal of its determination of a dispositive legal issue by mischaracterizing the decision as a remand order or combining it with remand instructions?

3. Whether the Longshore Act may, consistent with Equal Protection and Due Process guarantees, penalize successful litigants by permitting appeal (and Petition for Review) of a substantial question of law on a jurisdictional determination *only* in a situation where there is an award of benefits?

4. Whether Longshore jurisdiction and coverage may be constitutionally extended to alleged injury and asbestos exposure occurring in a land based calcine alumina manufacturing plant, where the time of injury occurred while the worker was performing his primary job in the manufacturing plant, and the sole connection with Longshore status was the *potential* that the worker could spend about one percent of his time, involving occasional or sporadic work in maintaining an overland conveyor system, physically removed from the vessel discharge operations by another employer?

5. Whether Longshore status, like the test for Seamen status in *Latsis,* requires a substantial connection in point of time and work, and not merely occasional or sporadic?

6. Whether the unloading process ends, and overland transportation begins, for purposes of Longshore situs and

status, when bauxite cargo is discharged from vessels by another employer, at a separate facility, and placed on two separate conveyor systems, which are not physically connected?

LIST OF PARTIES

The Aluminum Company of America was the Respondent and Petitioner below and is Petitioner here.

Esther Jones, widow of Charlie Jones, Jr., was the Claimant and Respondent below, and is a Respondent here.

The U.S. Department of Labor and Director, Office of Workers Compensation Programs was a Respondent below and is a Respondent here.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Petitioner is Aluminum Company of America known as Alcoa Inc. as of January 19, 1999 ("Alcoa"). The following are Alcoa's non-wholly owned subsidiaries: Adela Investment Company S.A.; Alcoa (Shanghai) Aluminum Products Company Limited (China); Alcoa Alumina & Chemicals, L.L.C. (Delaware); Abalco S.A. (Brazil); Alumar Consortium—Alumina Refining Enterprise (Brazil); Mineracao Rio Do Norte S.A. (Brazil); Acap Singapore PTE Ltd. (Singapore); Alcoa ACC Industrial Chemicals Ltd. (India); Alcoa Kasei Limited (Japan); Alcoa Minerals of Jamaica, L.L.C. (Delaware); Jamalco (Jamaica); Halco (Mining) Inc. (Delaware); Compagnie Des Bauxites De Guinee (CBG) (Delaware); Moral Co. Limited (Japan); St. Croix Alumina, L.L.C.; Suriname Aluminum Company, L.L.C. (Delaware); N.V. Hotelmaatschappij "Torarica" (Suriname); Suralco-Billiton Joint Venture #1 (Suriname); Suralco-Billiton Joint Venture #2 (Suriname); Alumar Consortium—Alumina Refining Enterprise (Brazil); Alcoa Aluminio S.A. (Brazil); Afl Do Brasil LTDA (Brazil); Alcatel Cabos Brasil S/A (Brazil); Alcoa Fios E Cabos Electricos S.A. (Brazil); Alumar Consoritum—Aluminum Smelting Enterprise (Brazil); Alusud Embalajes Chile LTDA (Chile); Alusud Embalajes Colombia LTDA (Colombia); Alusud Embalajes Peru LTDA (Peru); Closure Systems International India Private Limited (India); Alcoa International Holdings Company (Delaware); Alcoa Spain, S.A. (Spain); Alcoa Inespal, S.A. (Spain); Alumina Espanola, S.A. (Spain); Derivados Del Floor, S.A. (Spain); Alcoa Italia S.p.A. (Italy); Alumet Etten B.V. (The Netherlands); Capsulas Metalicas, S.A. (Spain); A-CMI Scandinavian Casting Center ANS (Norway); Elkem Aluminum (Norway) Alcoa of Australia Limited (Australia); Australian Fused Materials Pty Ltd. (Australia); ACAP Singapore PTE Ltd. (Singapore); Eastern Aluminum PTY Ltd. (Australia); Cape Bougainville Joint Venture (Australia);

Mitchell Plateau Joint Venture (Australia); Portland Aluminum Smelter (Australia); Spent Potlining Project Joint Venture (Australia); Alumivensa Limited (Bermuda); Alutodo, S.A. De C.V. (Mexico); Asian-American (Tianjin) Packaging Systems Co. Ltd. (China); KAAL Asia, Limited (Hong Kong); KAAL Australia Pty. Limited (Australia); KAAL Australia Superannuation Fund Pty. Ltd. (Australia); KOBE Alcoa Transportation Products Ltd. (Japan); Korea Packaging System Co., Ltd. (Korea); KSL Alcoa Aluminum Company, Ltd. (Hong Kong); Alcoa Latin American Holdings Corporation (British Virgin Islands); ALUSUD Argentina S.A. Industrial Y Commercial (Argentina); ALUSUD Embalajes Chile LTDA (Chile); ALUSUD Embalajes Colombia LTDA (Colombia); ALUSUD Embalajes Peru LTDA (Peru); Aluminum Can Recycling Association Limited (United Kingdom); The Can Makers Limited (England); Structural Laminates Company (Pennsylvania); Alcoa Fujikura Ltd. (Delaware); AFL Do Brasil LTDA (Brazil); Michels GMBH & Co., K.G. (Germany); Michels Kabel Beteiligungs GMBH (Germany); Michels Kabelloonfektionalo BT (Hungary); Stribel Svenska AB (Sweden); Mintel Communications, L.L.C. (Delaware); Quality Control Services, L.L.C. (Delaware); Six "R" Communications, L.L.C. (Delaware); United States Alumoweld Corporation (Delaware); Alcoa International Holdings Company (Delaware); Derivados Del Floor, S.A. (Spain); Alcoa Italia S.p.A. (Italy); Alumet Etten B.V. (The Netherlands); Capsulas Metalicas, S.A. (Spain); A-CMI Scandinavian Casting Center ANS (Norway); Elkem Aluminum (Norway); Alcoa of Australia Limited (Australia); Australian Fused Materials Pty. Ltd. (Australia); ACAP Singapore PTE Ltd. (Singapore); Eastern Aluminum Pty. Ltd. (Australia); Cape Bougainville Joint Venture (Australia); Mitchell Plateau Joint Venture (Australia); Portland Aluminum Smelter (Australia); Spent Potlining Project Joint Venture (Australia); Alumivensa Limited (Bermuda); Alutodo, S.A. De C.V. (Mexico);

Asian-American Containers Manufacturing (Tianjin) Co., Ltd. (China); KAAL Asia, Limited (Hong Kong); KAAL Australia Pty. Limited (Australia); KAAL Australia Superannuation Fund Ptd. Ltd. (Australia); KOBE Alcoa Transportation Products Ltd. (Japan); Korea Packaging Systems Co., Ltd. (Korea); KSL Alcoa Aluminum Company, Ltd. (Japan); KAAL Asia, Limited (Hong Kong); Alcoa Kobe Transportation Products, Inc. (Delaware); Alcoa Chemie GmbH (Germany); Alcoa Chemi Nederland B.V. (The Netherlands); Alcoa Moerdijk B.V. (The Netherlands); Norton-Alcoa Proppants (Arkansas); Alcoa Remediation Management, Inc. (Delaware); A-CMI (Michigan); Alutodo, S.A. De C.V. (Mexico); Alcoa Alumina & Chemicals, L.L.C. (Delaware); Alumar Consortium—Alumina Refining Enterprise (Brazil); ACAP Singapore PTE Ltd. (Singapore); Alcoa ACC Industrial Chemicals Ltd. (India); Alcoa Kasei Limited (Japan); Alcoa Minerals of Jamaica, L.L.C. (Delaware); Halco (Mining) Inc. (Delaware); Compagnie Des Bauxites De Guinee (CBG) (Delaware); Maralco Limited (Japan); St. Croix Alumina, L.L.C.(Delaware); Suriname Aluminum Company, L.L.C. (Delaware); N.V. Hotelmaatschappij "Torarica" (Suriname); Suralco-Billiton Joint Venture #1 (Suriname); Suralco-Billiton Joint Venture #2 (Suriname); Alcoa Caribbean Alumina Holdings, L.L.C. (Delaware); Alcoa Minerals of Jamaica, L.L.C. (Delaware); B & C Research, Inc. (Ohio); Reserve Industries (New Mexico); Corporate Insurance and Reinsurance Company Limited (Bermuda); Delta Holdings, Inc. (Delaware); Hopewell International Insurance, Ltd. (Bermuda); Tortuga Casualty Insurance Company (Cayman Islands); United Insurance Company (Cayman Islands); Alumax Extrusions Mexico, S.A. De C.V. (Mexico); Comercializadora Alumax Extrusions Mexico S.A. De C.V. (Mexico); I De A., S.A. De C.V. (Mexico); Alumax Europe N.V. (The Netherlands); Alumax De Mexico); Alumax Holdings De Mexico, S.A. De C.V. (Mexico); Alumax De Mexico, S.A. De C.V. (Mexico); Alumax Extrusions Mexico, S.A. De C.V. (Mexico);

Asesoria Mexicana Empresarial, S.A. De C.V. (Mexico); Comercializadora Alumax Extrusions Mexico S.A. De C.V. (Mexico); Asesoria Mexicana Empresarial, S.A. De C.V. (Mexico); Yunnan Xinmeilu Aluminum Foil Co., Ltd. (China); Kawaneer Deutschland GmbH (Germany); SSF (Japan); Alumax Holdings De Mexico S.A. De C.V. (Mexico); Alumax De Mexico, S.A. De C.V. (Mexico); Alumax Extrusions Mexico, S.A. De C.V. (Mexico); Asesoria Mexicana Empresarial, S.A. De C.V. (Mexico); Comercializadora Alumax Extrusions Mexico S.A. De C.V. (Mexico); American Trim, L.L.C. (Delaware); Capsulas Metalicas, S.A. (Spain); Corporation for Innovation Development (CID) (Indiana); DYAX Corp. (Delaware); Greater Lebanon Hotel Enterprises, Inc. (Pennsylvania); Gulf Closures W.L.L. (Bahrain); Ontek Corporation (California); Shibazaki Seisakusho Limited (Japan); and Squaw Creek Coal Company (Indiana).

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PETITION FOR WRIT OF CERTIORARI

Aluminum Company of America ("Alcoa") respectfully petitions that a writ of certiorari issue to review the October 16, 1997 decision of the Benefits Review Board and November 12, 1998 order from the Eleventh Circuit.

OPINIONS BELOW

The November 12, 1998 order from the Eleventh Circuit U.S. Court of appeals denying Alcoa's Petition for Rehearing (App. 1a) is unreported. The April 30, 1998 decision from the Eleventh Circuit dismissing the Petition for Review of the subject Benefits Review Board decision (App. 3a) is unreported. The decision and order from the Benefits Review Board reversing the conclusion that the subject work was not covered employment, dated October 16, 1997 (App. 4a), is reported at 31 BRBS 130

(1997). The initial decision and order from the Administrative Law Judge denying benefits based on a lack of status, dated October 3, 1996 (App. 16a), is reported at 30 BRBS 741 (ALJ) (1996).

JURISDICTION

On November 12, 1998 the Eleventh Circuit U.S. Court of Appeals denied Petitioner Alcoa's Petition for Rehearing and the appeal and Petition for Review of the Benefits Review Board decision was dismissed for lack of jurisdiction. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHC" or "the Act") provides a remedy for maritime workers that meet a two part status and situs test. Section 2 of the Act defines status in the following provisions:

> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—
>
> > (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law;

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902.

Section 3 of the Act defines situs as follows:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

STATEMENT OF THE CASE

This case was initially filed with the U.S. Department of Labor as a Longshore claim for death benefits based on alleged asbestos exposure. The date of death was March 21, 1980 and the claim was filed March 17, 1994. Alcoa controverted the claim on April 14, 1994 preserving triable issues which included jurisdiction, situs and status under the Longshore Act.

A. The Alcoa Facility

This case involves a determination of Longshore jurisdiction in an asbestos claim.

The claim was filed by the widow of a millwright at an Alcoa facility in Mobile, Alabama. The facility manufactured calcine alumina from bauxite.[1]

The bauxite was delivered to the Alcoa plant on a conveyor system, following discharge by the adjacent Ala-

[1] The calcine alumina manufactured at the plant is not a uniquely maritime product. Alcoa has a similar plant located in Central Arkansas, which is nearly 40 miles from the nearest body of navigable water, the Arkansas River. (RX 14, p. 52). Significantly, the Mobile plant, from an operational standpoint, could function by means of rail car deliveries of bauxite alone (RX 14, Applegate, p. 52), without supplies from the Alabama State Docks.

bama State Docks. There were other deliveries of bauxite by railcar. The facility and the subject employment is described in considerable detail in the decisions below.

While the alleged asbestos exposure occurred in the manufacturing plant, Longshore jurisdiction was premised on a contention that decedent spent at least 2% of his employment in maintaining an overland conveyor system (App. 14a). There was no asbestos on the conveyor systems. (TR. 40, 108).

B. Course of Proceedings Below

1. *Before the Office of Administrative Law Judges*

The claim was referred to the Office of Administrative Law Judges for formal hearing. Trial was conducted on December 6, 1994 by ALJ Richard K. Malamphy. The issues presented included jurisdiction under the Act and a consideration of maritime situs and status; whether decedent was exposed to asbestos at the subject Alcoa facility; and whether the decedent's fatal lung cancer was attributed solely to cigarette smoking, asbestos exposure, or a combination of both. (App. 17a).

The "Decision and Order—Denying benefits based on a lack of status under Section 2(3) of the Act" was issued by the trial judge on October 3, 1996 (App. 16a). The decision was limited to a consideration whether the sporadic or occasional repair work by the decedent on overland conveyor systems was sufficient to trigger jurisdiction under the Act.

The conveyor systems were the putative nexus between the decedent and Longshore situs and status although there was no asbestos material on any of the conveyor systems (TR. 40, 108). The alleged exposure for the claimant would have to occur, if at all, in other parts of the manufacturing facility which had no relationship, whatsoever, with the discharge of cargo. The Court described the conveyor systems as follows:

> Mr. Hartwell, a former plant manager, described the facility and stated that vessels off loaded materials at the Alabama State Docks, adjacent to the Alcoa site.
>
> If bauxite was destined for Alcoa, it was placed on conveyor "A" at the state docks and delivered to conveyor "B" which was primarily on Alcoa property. Conveyor "A" was eight feet above conveyor "B" and material dropped from A to B. Material from conveyor "B" was delivered to conveyor "C" where it was transferred to building 20 or building 22 where the bulk was then stored.

(Decision below, App. 21a).

The Court determined that, at most, decedent spent "about one percent" of his time in work pertaining to the subject conveyors (App. 24a). The factual findings from Judge Malamphy included the following:

> Mr. Jones was considered to be a millwright welder until 1978, and then this designation was changed to general mechanic. Mr. Hartwell testified that a millwright welder spent less than one percent of his time in repairing conveyor systems.

(Decision below, App. 21a). This testimony referred to conveyors involved in transport of bauxite in overland transportation throughout the Alcoa facility.

There were three conveyor systems in issue: (1) the Alabama State Docks system used by State Docks employees to discharge ocean going vessels supplying the raw material consumed in the manufacturing process at Alcoa (App. 20a); (2) the Alcoa conveyor system which received bauxite from the State Docks conveyor, following discharge, and transported the bauxite overland into an Alcoa storage facility (App. 21a); and (3) the Alcoa underground tunnels which moved the bauxite through the grinding and manufacturing process at the plant (App. 5a, n.1).

With respect to the Alabama State Docks system, no Alcoa employees were used to operate this conveyor or discharge vessels (App. 5a). Alcoa was not the only customer, and the State Docks used the facility to discharge many vessels for other customers (App. 24a). Nor was there a mechanical connection between the Alabama State Docks system and the Alcoa system. (TR. 34, 39).

Once the bauxite left the Alabama State docks conveyor, and as soon as the bauxite touched the Alcoa conveyor, it was in overland transportation for purposes of the manufacture of calcine alumina.[2] It went either into a storage building or directly into a grinding operation. This conveyor system was not a continuous operation, and it was possible for the bauxite to come to rest in the storage building before it would be consumed in the manufacturing process. In fact, bauxite could remain in one of these storage buildings for up to three months. (RX 4, Applegate, p. 54).

The third conveyor system outlined above was the series of underground tunnels that moved bauxite through various grinding and refining processes (App. 5a, n.1). The bauxite changed forms, many times, during the manufacturing process before the final product was completed. The underground conveyor system ran from the storage building, and was not mechanically connected to the other systems.

Alcoa contended, and the trial judge concluded, that the occasional work with respect to the Alcoa conveyor system does not support a finding of jurisdiction under the Act. This was not regular Longshore employment, and occasional or sporadic work would not render decedent's

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2 Since the "port used conveyor 'A' for functions which were not limited to the delivery of bauxite to Alcoa," the ALJ concluded "Mr. Jones' job was analogous to a truck driver as defined in *Caputo*." (App. 24a).

work an *integral* or *essential* part of loading or unloading a vessel (App. 24a).

Claimant relied heavily on testimony that Decedent, while employed as a millwright at Alcoa, could [3] be required to maintain various conveyor systems used to transport bauxite through the manufacturing process at Alcoa. While there was no asbestos on any of these conveyor systems (TR. 40, 108), it was contended that this work provided for Longshore status, so that a claim could be presented if there was asbestos exposure elsewhere in the plant involving work in the purely land based manufacturing process.

The pertinent testimony from the former Plant Manager Ray Hartwell was that, as a millwright, Decedent might have performed repairs to the Alcoa conveyors on a sporadic basis, but that this was not *regular* employment, and certainly not *integral* to vessel loading or unloading operations. According to Mr. Hartwell:

> Q. I believe I asked you earlier, but what percentage would you say of a millwright welder's work at Alcoa would involve repairs to any of the conveyor systems, or could you state a percentage?
>
> A. I would say for a millwright welder, I don't think it would be 1 percent.

---

[3] There was no credible testimony that decedent actually turned a wrench on the conveyors. While a coworker, Mr. Howard, testified decedent performed repairs to the conveyors (TR 89), his testimony was discredited since he also contended there was asbestos insulation on the conveyors (TR 100). There was none (Hartwell, TR 40, 108). Further the two men had no overlapping employment as millwrights. Another witness Mr. Simon acknowledged that he never worked as a millwright or millwright welder (JX 1, p. 8). The record evidence credited by the ALJ was based on testimony from the retired Plant Manager that a millwright welder could be involved in this type of work "maybe 2 percent" of the time. (TR 75).

> Q. And what percent or portion of work as a general mechanic would you say would be involved in repairs to the caustic dock or the alumina dock?
>
> A. Maybe 2 percent.

(Hartwell, TR 75).

The Court also considered the potential that decedent might be involved in *occasional* repairs to a dock facility used for loading caustic into barges:

> A general mechanic could spend up to two percent of his day involved in repairs to the caustic dock or the alumina dock. A 48-inch conveyor belt delivered material from the alumina silo to barges at the alumina dock.

(App. 21a). There was no evidence presented that decedent actually worked on the caustic dock or machinery there [4] and Claimant conceded that "the evidence does not mention whether Mr. Jones was ever seen performing maintenance and repair work on the alumina dock and machinery" (Claimant's Post Trial Brief, p. 6), and conceded that the evidence did not indicate whether decedent worked on the caustic pipeline (*id.*, p. 7).

The trial court concluded that decedent "does not meet the definition of status under Section 2(3) of the Act" (App. 24a), since the Alcoa conveyor system was overland transportation of the cargo, following completed discharge operations. The court then concluded "Mr. Jones' job was analogous to the truck driver as defined in *Caputo.*" (App. 24a). The holding in the trial court was based on the following analysis of the facts and law:

> In this case there is no allegation that Mr. Jones ever worked on port authority machinery or was required to be on port property. Mr. Jones may have

---

[4] The ALJ noted "[t]here has been no suggestion in this case that Mr. Jones ever worked on the caustic dock or the alumina dock." (App. 23a).

> spent about one percent of his time repairing and maintaining conveyor "B" which belonged to Alcoa and was primarily on Alcoa property.
>
> When bauxite spilled from conveyor "A" to conveyor "B", the bauxite was now in the possession of the ultimate user. Alcoa did not store and resell bauxite, but performed a manufacturing process that turned bauxite into alumina.
>
> The undersigned concludes that Mr. Jones' duties were not an integral part of vessel loading or unloading. In *Caputo, supra,* the Court stated that employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime commerce are not covered.
>
> The port used conveyor "A" for functions which were not limited to the delivery of bauxite to Alcoa. For the above reasons, this administrative law judge finds that Mr. Jones' job was analogous to a truck driver as defined in *Caputo.*

(Decision below, App. 24a).

2. ***Before the Benefits Review Board***

No motion for reconsideration was filed. A timely Petition for Review was filed with the Benefits Review Board on December 5, 1996. On October 16, 1997 the Board reversed. After stating the applicable standard that the findings of fact and conclusions of law from the administrative law judges must be affirmed "if they are supported by substantial evidence, are rational, and are in accordance with law" (App. 5a), the Board reversed on the legal issue, whether there was Longshore jurisdiction. The holding is as follows:

> Although the maintenance of the conveyor belts was infrequent pursuant to the credited testimony of Mr. Hartwell, this work nevertheless confers coverage under the Act because it was a regular, non-discre-

> tionary part of the job. *See Schwalb,* 493 U.S. at 47, 23 BRBS at 99 (CRT). As the administrative law judge found that decedent could have been and actually was assigned to work on the bauxite conveyor about one percent of his time, Decision and Order at 7, **we reverse his conclusion that such work was not covered employment.** Lewis, 31 BRBS at 40-41.
>
> Accordingly, the administrative law judge's Decision and Order denying benefits is vacated. **The case is remanded to the administrative law judge for consideration of the remaining issues** raised by the parties.

(Decision below, App. 14a) (emphasis added.) The Board remanded for the administrative law judge to consider the remaining issues.

3. *In the Eleventh Circuit U.S. Court of Appeals*

A Petition for Review was filed in the U. S. Court of Appeals for the Eleventh Circuit on November 28, 1997. Claimant moved to dismiss the appeal and, after submission of briefs on the issue of jurisdiction in the Court of Appeals, the Eleventh Circuit dismissed the appeal on April 30, 1998 (App. 3a), finding that an order from the Benefits Review Board remanding the case was not a final order subject to review. The Court determined that it lacked jurisdiction based on the authority of 33 U.S.C. § 921(c) and *Jacksonville Shipyards, Inc. v. Estate of Verderane,* 729 F.2d 726 (11th Cir. 1984) (App. 3a).

A Petition of Rehearing was filed on May 20, 1998 based on the authority[5] that Circuit Courts have the

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[5] Petitioner also urged the Court to adopt the pragmatic finality exception to the preference against plenary review of remand orders from *Newpark Shipbuilding & Repair, Inc. v. Roundtree,* 698 F.2d 743, 748 (5th Cir. 1983). This exception indicated a remand order is appealable where the "question on appeal is to determine the proper legal standard to be applied." Since the

power, pursuant to 33 U.S.C. § 921, to review a Benefits Review Board decision which reversed an ALJ or which considered a legal issue. *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). As the Court in *Carozza* explained, if the Board decides a question of law, "[s]uch a determination is, however, subject to plenary review here. . . ." *Carozza, supra*, 727 F.2d at 77. The Court's power was derived, in part, from 33 U.S.C. § 921(b)(3) which in turn authorized the inferior court, the Benefits Review Board, to determine appeals regarding a substantial question of law. *Id.*, 727 F.2d at 76.

The Benefits Review Board has also determined that a decision denying benefits based solely on a jurisdictional determination is final for appeal. *Thessalonian Jackson v. Strauss Systems, Inc.*, 21 BRBS 266, n.2 (1988) applying the *Cohen* doctrine.[6] This was precisely the situation presented to the Board and the Eleventh Circuit in the case *sub judice*. Consequently, an appeal to the Benefits Review Board or Eleventh Circuit was proper. Other jurisdictional exceptions to the final judgment rule which have the same effect as the *Cohen* doctrine, which should permit review here, require a showing of hardship to the appealing party. *Robinson v. Tanner*, 798 F.2d 1378,

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Roundtree panel, eventually, rejected this exception, *id.*, 723 F.2d 399, 407, Petitioner relied on the initial *Roundtree* decsion, 698 F.2d at 748, and subsequent dissent, *Roundtree, supra*, 723 F.2d at 407 (Williams, Clark, Brown, Garza, JJ.) in seeking rehearing. It is significant that the initial *Roundtree* opinion was based on precedent from this Court that "the question of finality deserves a 'practical rather than a technical construction. . . .'" *Id.*, 698 F.2d at 748, citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964).

[6] *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), which permits review of an interlocutory order if three criteria are met: (1) the order must conclusively determine the disputed question, (2) the order must resolve an important issue that is completely separate from the merits of the actions; and (3) the order must be effectively unreviewable on appeal from a final judgment.

1381 (11th Cir. 1986); *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1095 (5th Cir. 1977).

The hardship to Alcoa here would be the inconsistency presented by the logical consequence of the rulings from the Eleventh Circuit and Benefits Review Board, which would be to permit direct appeal of a final determination of Longshore jurisdiction only in the situation where there is a decision *upholding* jurisdiction and entering a compensation order. For the Court to disallow an appeal from an order *denying* jurisdiction and benefits would, in many instances, effectively preclude effective means of review since there is no basis to post a supersedeas bond or effectively stay payment of a compensation order pending an appeal.

There are literally hundreds of cases in which the Benefits Review Board routinely denies a Petition for Stay of Payment of Compensation pending appeal, based on a contention that recovery of the paid benefits would be unlikely in the event the decision is reversed on appeal. Such a double standard would be an impermissible violation of due process or equal protection guarantees of the U.S. Constitution. In other words, this should be deemed an unconstitutional penalty on successful litigants. *See*, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972) (overturning a double bond requirement).

Alcoa filed a Petition for Rehearing on May 20, 1998 which was denied by the Eleventh Circuit on November 12, 1998.

REASONS FOR GRANTING THE PETITION

There are three primary arguments for granting the writ. This Court's decision on the jurisdictional issues could impose certainty in this area of Longshore law and would affect literally hundreds of potential retiree asbestos claimants, in substantially land based operations at the Alcoa facility, and thousands of similar workers in other

employers' facilities. The writ should be granted, also, to resolve the conflict in the Circuits whether a fixed rule against *any* remand order is appropriate, or whether a more pragmatic approach is required by logic and due process. Finally, review on certiorari (or further consideration by the Eleventh Circuit) should be required to further define the limits of Longshore jurisdiction, and conflicting decisions whether "some" or "substantial" or "even one percent" employment is sufficient to invoke maritime status and Longshore jurisdiction.

A. Logic and Due Process review of certain remand orders, where the order conclusively determines a legal issue or legal standard, such as jurisdiction, or where the Benefits Review Board has exceeded its statutorily defined powers of review, and this Court should set uniform guidelines for the Circuits on this issue.

The United States Courts of Appeal are divided on the issue whether § 921 of the LHC permits appellate review of a final [7] decision from the Benefits Review Board on a dispositive legal issue which is disguised as an interlocutory "remand" order. The Third Circuit has permitted such a review where the Board reversed an order denying benefits and remanded for a calculation of amounts due. *Sea-Land Service, Inc. v. Director*, 540 F.2d 629, 631 n.1 (3rd Cir. 1976). The Eighth Circuit has also permitted such a review, e.g., where the Board clearly reversed an ALJ but remanded for additional findings. *St. Louis Shipbuilding & Steel Co. v. Casteel*, 583 F.2d 876, n.1 (8th Cir. 1978). The *Sea-Land* and *Casteel* cases are a perfect analogy since, here, the Board clearly reversed the order denying benefits, and added language to require additional findings on remand.

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[7] The Act provides "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred. . . ." 33 U.S.C. § 921(c).

Similarly, the Fifth Circuit has determined that, in the *proper* case, it can review a decision to remand. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1992). According to the Fifth Circuit, "logic and due process would require this Court be able to review the decision to remand." *Id.* at 944. *Mijangos* involved the rather transparent attempt by the Board to re-weigh the evidence and substitute its own fact finding for those of the ALJ. *Id.* at 945. The following standard applied:

> The Board does not have the authority to engage in a de novo review of the ALJ. The findings of the ALJ must be accepted unless they are not supported by substantial evidence in the record considered as a whole or unless they are irrational.

Mijangos, 948 F.2d at 944.

That is precisely what happened in the Court below. As in *Mijangos*, the Board in this proceeding exceeded its limited powers of review when it re-weighed the evidence and found that the subject employment was essential or integral to longshoring operations, and that it did not involve movement of discharged cargo in overland transportation. The same logic in *Mijangos* should therefore require review of what the Board actually did in this case as opposed to allowing the inquiry to end with the remand label, and a fixed rule regarding non-review of "remand" orders. This Court should not permit such an exercise in putting form over substance.

The Court should review the dispositive order of the Board now without waiting for the same dispositive issue to arise again after remand. The parties to this proceeding should be spared the enormous costs of further litigation when an appellate resolution of this issue now will conclusively determine the dispositive jurisdictional issues.

The following language from *Mijangos* should be considered:

> If this Court could not now review the decision to remand, the Board would be free to remand close cases until the ALJ produced an order that comported with the Board's view of the facts. The Board cannot usurp the fact-finding responsibility of the ALJ through its limited powers of review.

Mijangos, 948 F.2d at 944. In deciding to review the putative "remand" order the Fifth Circuit distinguished *Roundtree, supra*, 723 F.2d 399, which had previously held that an order remanding a case may not be appealed. *Mijangos*, 948 F.2d at 943. As noted above, the initial decision in *Roundtree*, 698 F.2d 743, was more in line with pronouncements of this Court [8] that "the question of finality deserves a 'practical rather than a technical construction. . . .' " *Id.* at 748.

As noted above, the Eleventh Circuit rejected the appeal in this case, with little analysis (App. 3a), based on the authority in *Jacksonville Shipyards, Inc. v. Estate of Verderane*, 729 F.2d 726 (11th Cir. 1984). Similar results may be found in the First Circuit [9] and D.C. Circuit [10]. It is apparent that a fixed rule against *any* appeal of a remand order, or a dispositive decision disguised as a remand order, is inappropriate. Such a rigid application of § 921 would allow the Benefits Review Board to continue to abuse and exceed its limited powers of review. Consequently, as *Mijangos* has recognized, since logic and due process may require the Courts to review a decision to remand, this Court should grant the petition for certiorari

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[8] This reference in *Roundtree* is taken from *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). It is also in line with the *Cohen* doctrine which permits review of interlocutory orders on an important and conclusive legal issue. These arguments have been addressed in the discussion of the proceedings in the Courts below and for purposes of brevity will not be repeated in full here. *See*, discussion of *Cohen* and *Roundtree, supra*, at pp. 11-12.

[9] *Director v. Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1983).

[10] *WMATA v. Director*, 824 F.2d 94 (D.C. Cir. 1987).

and establish a uniform framework for review of Benefits Review Board decisions that are not truly interlocutory in nature, but actually and finally determine dispositive legal issues.

B. There is confusion presented as to the quantum of work required to invoke maritime or Longshore status, and this Court should resolve conflicting pronouncements whether "at least some" vs. "substantial" employment is required, and the decision below which permitted "about one percent" to suffice.

This Court should also resolve conflicting decisions below which purport to be based on the authority of this Court in *Caputo*,[11] *Pfeiffer*[12] and *Schwalb*[13]. The Court should clarify this area of the law and, consistent with the more recent *Latsis*[14] decision, impose a consistent standard for maritime status, requiring a substantial connection "in both duration and nature," 515 U.S. at ——, 132 L.Ed.2d at 338, and not "merely sporadic." *Id.*, 515 U.S. at ——, 132 L.Ed.2d at 337.

Certainty in this area of the law is required in at least three areas: (1) a determination when the unloading process is completed and overland transportation begins; (2) guidelines for the characterization of work as "integral" or "essential to" indisputably longshoring operations; (3) quantification of the requirement that Longshore jurisdiction applies to "persons whose employment is such that they spend *at least some* of their time in indisputably longshoring operations," *Caputo*, 432 U.S. at 273; and (4) clarification of the exclusion from Longshore coverage for occasional or sporadic work.

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[11] *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

[12] *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979).

[13] *Chesapeake and Ohio Ry. v. Schwalb*, 493 U.S. 40 (1989).

[14] *Chandris, Inc. v. Latsis*, 515 U.S. 347, 132 L.Ed. 2d 314 (1995).

The opinions in *Caputo, Pfeiffer* and *Schwalb* must be squared with this Court's analogous determination of seamen's status in *Latsis* which requires that the subject work, to confer maritime status, must be "substantial" work both "in point of time and work, and not merely transitory or sporadic." *Latsis,* 515 U.S. at ——, 132 L.Ed.2d at 337-338.

The Administrative Law Judge denied benefits and jurisdiction based on the authority of this Court in *Caputo, Pfeiffer* and *Schwalb*, by properly characterizing the issue in terms of *overland transportation*, and *occasional* or *sporadic* work which was not essential or integral to longshoring operations. As the *Caputo* decision established, employees whose responsibility involve the overland transportation of cargo, once it has been unloaded from a vessel, are not considered to be Longshore employees. *Id.* at 249. Consequently, the trial court properly analogized to the truck driver in *Caputo* who, while employed in a maritime situs,[15] is not considered to be engaged in a longshoring operation (or maritime status), since the cargo has been completely discharged prior to the involvement of the trucker.

> [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

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[15] Although the Board indicated the "parties agree that employer's facility constitutes a maritime situs" (App. 7a, n.4), Alcoa has continuously disputed that injury occurred in a maritime situs (TR. 7) since, as noted, there could be no exposure to asbestos materials on the conveyors in question. There was no asbestos materials on the conveyors (TR. 40, 108). The asbestos exposure (if any) was in the purely land based manufacturing operations of the plant and, consequently, this injury did not occur in a maritime situs.

Caputo, 432 U.S. at 267. The trial court also properly relied on precedent from this Court that Longshore status requires the subject task must be "clearly an integral part of the unloading process. . . ." *Caputo*, 432 U.S. at 271. The potential that decedent could have spent two percent of his time in repairs to a conveyor system thus could not be *essential* or *integral* to the unloading process.

The Benefits Review Board reversed, and reached an opposite conclusion, based on lower court authority in *Conye v. Refined Sugars, Inc.*, 28 BRBS 372 (1994) and *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) by substituting its conclusion that "the conveyor system did not move stored cargo, but instead moved shipped cargo that was still in the unloading process." (App. 12a).

The Board interpreted its findings as "consistent with" *Schwalb* and *Caputo* by holding "that the loading process did not end until the raw material reached the storage facility." (App. 13a). The rationale was said to be that "the administrative law judge erred in establishing a boundary between Conveyor A and Conveyor B on the ground that the Port owns and maintains Conveyor A and employer owns and maintains Conveyor B." (App. 11a) The Court did not establish the boundary, however, since it was created by operation of law once cargo discharge operations were completed by the Alabama State Docks, and the title to the bauxite had passed.[16]

The Benefits Review Board also concluded that *even one percent*[17] of work in repairing and maintaining the

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[16] As the ALJ correctly observed, "when bauxite spilled from conveyor "A" to conveyor "B," the bauxite was now in the possession of the ultimate user. Alcoa did not store and resell bauxite, but performed a manufacturing process that turned the bauxite into alumina." (App. 24a).

[17] The Board reversed based on the ALJ finding that "decedent could have been and actually was assigned to work on the bauxite

Alcoa conveyor belts would justify coverage under the Act, based on the authority of *Schwalb*, "because it was a regular, non-discretionary part of the job." (App. 14a). This is inconsistent with Circuit authority that work which is "momentary or episodic" is not a regular part of decedent's duties and, thus, insufficient to convey maritime status. *Dorris v. Director*, 808 F.2d 1362, 1365 (9th Cir. 1987). As noted, it is also inconsistent with the analogous standard pronounced by this Court that, for determination of seamen's status, the subject work must be "substantial in point of time and work, and not merely sporadic." *Latsis*, 515 U.S. at —, 132 L.Ed. 2d at 337.

Although the issue was addressed in brief, none of the Courts considered whether Longshore jurisdiction could be extended despite the fact that decedent could not be engaged in arguable longshoring operations at the *time of injury*, i.e. the time of alleged asbestos exposure.[18] There was no asbestos on the conveyor systems in issue and, consequently, decedent could not be injured, i.e. exposed to asbestos, while performing the "indisputably longshoring operations" as required by *Caputo*.

No doubt, if the converse were true, i.e., if there was shown to be asbestos on the conveyor systems, Claimant and the Benefits Review Board would argue time of injury to be controlling. *See, e.g., Pittman Mechanical Contractors v. Director*, 35 F.3d 122, 126 (4th Cir. 1994)

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conveyor *about one percent* of his time. . . ." (App. 14a) (emphasis added.)

[18] The injury occurred when the decedent was exposed to the friable asbestos fibers. *See generally*, Arnold R. Brody, *Asbestos* in 8 Comprehensive Toxicology 393 (Robert A. Roth vol. ed., 1997). According to Brody, various structural, biochemical and molecular alterations occur at the first exposure which lead to diffuse asbestosis. *Id.* at 400. *But see, Bath Iron Works v. Director*, 506 U.S. 153, 163 (1993) determining for purposes of LHC claims that the injury does not occur until the time of manifestation of the disease. The Court should reexamine this conclusion in light of subsequent medical knowledge.

(awarding benefits when claimant was injured while in the act of repairing a pipeline deemed essential to the operation of a vessel.)

This Court has also recognized time of injury as a relevant inquiry in *Schwalb*, in which the Court specifically pointed out that the covered employees were connected with the loading process at the time of the injury. The decision of this Court in *Schwalb* referred to "maintenance services that they [the claimants] were performing when they were injured." 493 U.S. at 46.

Consequently, this Court should determine that Longshore jurisdiction should not be extended to the situation presented here, in which the connection to the Longshore Act is tenuous at best since the work in question involves the contention that the decedent might have spent an exceedingly small portion of his employment, at most two percent of his time, in servicing a conveyor system. Further, this Court should not allow Longshore jurisdiction to be extended to such an extreme where the connection with the Longshore Act does not even involve exposure to the substance alleged to have caused injury, friable asbestos fibers, since alleged exposure occurred, if at all, in purely land based manufacturing operations in another area of the Alcoa facility far removed from conveyors or vessel discharge operations.

In opposing a time of injury analysis, Claimant has argued dictum from *Pfeiffer* regarding Congressional concerns "that some workers might walk in and out of coverage." Id., 444 U.S. at 83. The fact is, however, that this Court has subsequently recognized that there are indeed workers who may walk in and out of coverage since the time of injury is a critical factor in many cases. As this Court has stated, "[T]here will always be a boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985). Further, this Court recognizes that "Congress did not seek to cover all of those

who breathe salt air." *Id.* at 423. Consequently, "persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Id.*

The requested writ should be granted since the facts of this case thus provide a basis to clarify the widely divergent interpretations of *Caputo, Pfeiffer* and *Schwalb*; resolve the rather uncertain boundaries of Longshore jurisdiction and status under the Act; and state a uniform standard applicable to maritime workers, whether Seamen or Longshoremen, that requires a showing of "substantial" work activity, and something more than occasional or sporadic work in covered employment. The Court can also clarify what is meant by the seemingly inconsistent pronouncements that "at least some" of the maritime workers' time must be spent in longshoring operations while, at the same time, requiring that the work must be regular, essential or integral to cargo operations in order for the Act to extend coverage.

The Court should also grant review to police the actions of the Benefits Review Board, and protect against limitations on Petitioner's right of appeal, which were so easily abrogated by the Board's *ipse dixit* proclamation that its decision was merely a remand order. For the Court to hold otherwise would condone the rather disingenuous remand label by the Benefits Review Board of a decision holding "we reverse his conclusion that such work was not covered." In doing so the Court would ensure that the Act is applied in a rational or equal manner, so that a litigant's appellate review provided in § 921 of the Act is not limited, in effect, to situations in which there is a compensation order and award of benefits.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GREGORY C. BUFFALOW *
THOMAS J. WOODFORD
MILLER, HAMILTON, SNIDER
& ODOM LLC
254 State Street
P.O. Box 46
Mobile, Alabama 36603
(334) 432-1414
Attorneys for Petitioner

* Counsel of Record

APPENDIX A

[Filed Nov. 12, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6959

ALUMINUM COMPANY OF AMERICA,
Petitioner,

versus

U.S. DEPARTMENT OF LABOR and DIRECTOR,
OFFICE OF WORKERS COMPENSATION PROGRAMS;
ESTHER JONES (widow of Charles Jones),
Respondents.

Petition for Review of an Order
of the Benefits Review Board

Before TJOFLAT, EDMONDSON, and BARKETT, Circuit Judges.

BY THE COURT:

Petitioner's petition for rehearing, construed as a motion for reconsideration of this Court's April 30, 1998, order that dismissed its petition for review for lack of jurisdiction, is DENIED.

The following action has been taken in the referenced case:

- The enclosed order has been ENTERED.
- No further action will be taken.

Sincerely,

/s/ Thomas K. Kahn
THOMAS K. KAHN
Clerk

APPENDIX B

[Filed Apr. 30, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6959

ALUMINUM COMPANY OF AMERICA,
Petitioner,

versus

U.S. DEPARTMENT OF LABOR and DIRECTOR,
OFFICE OF WORKERS COMPENSATION PROGRAMS;
ESTHER JONES (widow of Charles Jones),
Respondents.

Petition for Review of an Order
of the Benefits Review Board

Before TJOFLAT, EDMONDSON, and BARKETT, Circuit Judges.

BY THE COURT:

Respondent Jones' motion to dismiss this petition for review for lack of jurisdiction is GRANTED. The Benefits Review Board's October 16, 1997, order that vacated the Administrative Law Judge's (ALJ's) order denying a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, and remanded the case to the ALJ is not a final decision. *See* 33 U.S.C. § 921(c); *Jacksonville Shipyards, Inc. v. Estate of Verderane*, 729 F.2d 726 (11th Cir. 1984).

APPENDIX C

Date Issued: Oct. 16, 1997

U.S. DEPARTMENT OF LABOR
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 97-287

ESTHER JONES
(Widow of CHARLES JONES),
Claimant-Petitioner
v.

ALUMINUM COMPANY OF AMERICA
Self-Insured
Employer-Respondent

DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-2055) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*

(the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer from July 1972 until his illness and death in March 1980 caused by carcinoma of the left lung with metastasis to the brain. From July 1972 through November 12, 1978, decedent worked as a millwright welder, and thereafter he worked as a general mechanic. Cl. Exs. 13, 20. His duties as a millwright welder required him to perform cutting, welding, fusing and heating operations to install, maintain, repair and service machinery at employer's plant.[1] Emp. Ex. 12. As a general mechanic, a category to which all the maintenance-type workers were changed in 1978, decedent was required to "construct, install, maintain, repair, and service all types of equipment, machinery, structures, ducting, and piping systems." Emp. Ex. 11. Claimant contends decedent was exposed at employer's facility to asbestos which contributed to his death. Claimant and her five children filed claims for death benefits. Cl. Exs. 2, 7.

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[1] Employer's facility converted bauxite into calcine alumina, otherwise known as aluminum oxide, which would later be used to produce aluminum. Tr. at 37. Shipments of bauxite were unloaded at the State Port Authority docks and placed on Conveyor A, which was owned and maintained by the state of Alabama. Bauxite destined for employer's facility dropped from Conveyor A to Conveyor B, which was owned and operated by employer and most of which was on employer's property. From Conveyor B; the bauxite would travel to Conveyor C where it would then travel to one of two storage buildings. Emp. Ex. 13; Tr. at 33-35. When employer needed the bauxite in the manufacturing process, workers would bulldoze it through trap doors in the floor of the storage buildings which led to underground conveyor belts. Tr. at 36; *se also Garmon v. Aluminum Company of America-Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

The administrative law judge addressed only one issue in his decision. He concluded that decedent's job as a millwright welder and general mechanic did not satisfy the Section 2(3), 33 U.S.C. § 902(3), status requirement. Specifically, he found that decedent's work maintaining Conveyor B did not meet the definition of maritime employment because it was not an integral part of loading or unloading a vessel. Decision and Order at 7. The administrative law judge stated that when the bauxite spilled from Conveyor A to Conveyor B it came into possession of the ultimate user for manufacturing purposes and, therefore, it was no longer in the unloading process.

Claimant appeals the administrative law judge's decision, arguing that decedent was engaged in maritime employment by virtue of his work on the conveyor belts and work to which he may have been assigned on the alumina loading dock and the liquid caustic dock.[2] Employer responds, urging affirmance of the administrative law judge's denial of benefits because claimant failed to establish decedent's maritime status.[3] For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work

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[2] The plant's final product, alumina, was moved to the barges for maritime transportation via a conveyor belt called a "gravity conveyor" or an "airslide." The liquid caustic arrived at employer's facility on a barge and was off-loaded by way of a pump and pipeline. Tr. at 60-61, 107-108.

[3] Employer has filed a Statement for Oral Argument before the Board *en banc*. We deny employer's motion, as it was not filed in the proper form pursuant to Section 802.219(b) of the regulations. 20 C.F.R. § 802.219(b). Moreover, we conclude that oral argument is unnecessary to resolve the issue in this case. 20 C.F.R. § 802.219. Further, we decline to address the additional issues employer raises in its response brief because, as claimant asserts, they were not addressed by the administrative law judge. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990)

is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§ 902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act.[4] *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

Generally, an employee satisfies the "status" requirement if he is engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. § 902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he must "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

Decedent worked as a millwright welder and a general mechanic for employer. A millwright welder works in tandem with a millwright. Mr. House, a co-worker who was a millwright, testified that he and decedent repaired and maintained conveyor belts, specifically the bauxite

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[4] The parties agree that employer's facility constitutes a maritime situs under Section 3(a). Decision and Order at 2, 4.

system (Conveyors B and C), changing rollers, head pullers, adjusting belts, and oiling and maintaining rollers. He stated they also changed motors and repaired pumps, working in the power house, the plant, near the digesters and boilers, and on machinery between the water and the plant. Cl. Ex. 22; Tr. at 82, 84-88. Other co-workers, Mr. Simon and Mr. Howard, confirmed decedent's work on the bauxite conveyor system, but neither knew whether decedent worked on the liquid caustic or alumina docks. Jt. Ex. 1 at 14, 24-25, 35; Jt. Ex. 2 at 20, 43-44, 46-48.

According to Mr. Hartwell, a former plant manager, repair work of the conveyor systems was a "regular part" of a millwright's, and later a general mechanics's, job. Specifically, he stated that although a millwright/general mechanic was responsible for maintaining and repairing the conveyor belts, and that a welder would accompany the millwright, this would involve approximately one percent or less of the millwright welder's work. Tr. at 72-75. With regard to the dock activity, Mr. Hartwell testified that the general mechanic's duties included observing the discharge of liquid caustic and maintaining the alumina conveyor but that this constituted less than two percent of a general mechanic's work. Tr. at 61-63, 75-76.

In this case, the administrative law judge acknowledged the three possible work areas where decedent's duties could confer coverage under Section 2(3): the bauxite conveyors, the alumina dock and the caustic dock. He then noted claimant's contention that decedent could have been and actually was assigned to work in all three areas. Decision and Order at 4. The administrative law judge determined that decedent could have spent approximately one percent of his time repairing Conveyor B, but that there is "no suggestion" that he ever worked on the alumina or caustic docks. He then concluded that decedent's duties as to Conveyor B were not integral to the unloading process but were analogous to the truck driver's duties as discussed by the Supreme Court in *Caputo*. *See* discussion, *infra*.

Specifically, the administrative law judge found that when the bauxite spilled from Conveyor A to Conveyor B, it came into the possession of the ultimate user. Decision and Order at 7. Thus, he found that the transition from the "unloading" process to the "manufacturing" process occurred once the bauxite left Conveyor A.

Claimant alleges error in this finding, and asserts that this case is controlled by the Board's decision in *Garmon v. Aluminum Co. of America—Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995). In *Garmon*, the claimant was a bulldozer operator for ALCOA who bulldozed bauxite into piles in the storage buildings and pushed the piles through the trap doors for transport on the underground conveyor system. The claimant also removed scrap iron from the above-ground conveyor belts leading to the storage buildings and replaced bauxite which had fallen from the same conveyor belts. *Garmon*, 28 BRBS at 47. The administrative law judge found, and the Board affirmed, that the claimant's bulldozing duties in the storage buildings were insufficient to confer coverage. However, the Board held there was testimony which, if credited, could establish that the claimant performed covered work "since ensuring that the conveyor belts leading from the ships to the storage facility continued operating entails part of the 'overall unloading process' . . . ." *Id.* at 49. Therefore, because the administrative law judge had not considered that aspect of the claimant's duties, the Board remanded the case for him to address whether the testimony established that the claimant performed work on the conveyor belts "which constituted part of the unloading process and which is covered under the Act." *Id.* at 50. On reconsideration, the Board reaffirmed its decision to remand the case for the administrative law judge to consider the claimant's conveyor belt duties. *Garmon*, 29 BRBS at 15.

In stating that maintenance and repair of the conveyor belts leading from the ships to the storage buildings con-

stitute covered employment, the Board relied on the Supreme Court's decision in *Schwalb*. In that case, the Supreme Court stated:

> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires.

Schwalb, 493 U.S. at 47, 23 BRBS at 99 (CRT); *Garmon*, 28 BRBS at 49-50. The Court stated that the determinative consideration is whether the ship loading/unloading process could continue without the claimant's function, and it noted that it is irrelevant whether the employee may have other duties unconnected to loading or unloading or whether his contribution to the loading process is not continuous. *Id.*; *see also Ford*, 444 U.S. at 82, 11 BRBS at 328; *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165.

In *Caputo*, the Supreme Court held that employees who were hired as terminal labor from the hiring hall, when there was no work for their regular stevedoring crew, and who could be assigned to any number of tasks on the waterfront, are covered employees if they are "engaged in the final steps of moving cargo from maritime to land transportation: putting it in the consignee's truck." *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165. Thus, claimant Caputo, who was loading trucks with discharged cargo sitting on the docks when he was injured, was covered by the Act. *See also Ford*, 444 U.S. at 82, 11 BRBS at 328 (coverage conferred on those involved in the intermediate steps of moving cargo between ship and land transportation). In addressing the language of the Act, the Court distinguished Caputo's job from that of a truck driver, who was merely responsible for picking up or delivering cargo "unloaded from or destined for maritime trans-

portation." *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *see also Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987).

The administrative law judge in the instant case likened decedent's work to that of the truck driver because the administrative law judge found that the bauxite had come into the possession of the ultimate consumer when it reached Conveyor B and therefore was no longer in the unloading process. Initially, we hold that the administrative law judge erred in establishing a boundary between Conveyor A and Conveyor B on the ground that the Port owns and maintains Conveyor A and employer owns and maintains Conveyor B. He found that bauxite which spilled from Conveyor A to Conveyor B "was now in the possession of the ultimate user" and was no longer in the unloading process. Decision and Order at 7. The Board has held that when raw materials are unloaded from a ship at a manufacturing plant and are refined or used in a manufacturing process, loading activities are complete upon the delivery of the goods to the plant. *Conye v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *see also Prolerized New England Co. v. Benefits Review Board*, 627 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981). Thus, in *Garmon*, the Board held that the unloading process was complete when the bauxite was received for storage because it is at this point that the product has reached the consumer and is not stored for further transhipment. *Garmon*, 28 BRBS at 49; *see generally Caputo*, 432 U.S. at 277-278, 6 BRBS 168-169 (rejecting "point of rest" theory). The Board stated, however, that ensuring the continued operation of the conveyor belt leading from the ships to the storage facility is part of the overall unloading process, *Garmon*, 28 BRBS at 49-50, *citing Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT), and it remanded the case for consideration of the evidence regarding whether the claimant maintained the conveyor belts.

Contrary to the administrative law judge's finding, the situation herein is not analogous to the truck driver analysis in *Caputo*. There, the Court stated that a driver whose job was to load and carry cargo which had been stored for further transshipment over land was not a covered employee. *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *cf. Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168 (CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984) (employee who helps deliver cargo from initial point of rest on docks to storage area is covered despite paper transfer of ownership at the point of rest); *Warren Brothers v. Nelson*, 635 F.2d 552 (6th Cir. 1980) (truck driver injured while transporting gravel unloaded from barges to storage pile was integral to unloading process). By contrast, the court found that employees such as claimant Caputo, who was loading the truck, are engaged in steps in the loading process and thus covered until the process is complete regardless of whether the cargo is containerized or whether it halts at a point of rest on the dock.

In this case, although the primary purpose of employer's facility was to process alumina, the work at issue involves maintenance of the conveyors which transported bauxite from the ships to employer's storage facility for later use in the manufacturing process. Thus, the conveyor system did not move stored cargo, but instead moved shipped cargo that was still in the unloading process.[5] *See Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982) (worker who maintains conveyor belt and "stacker" which are integral to loading the product onto ships is covered). Given the holding of

---

[5] The testimony of record implies that movement of the bauxite on the conveyor system between the ships and the storage building was a continuous process. Jt. Ex. 2 at 41, 44; Tr. at 58. Thus, Conveyors A, B and C are all integral to the unloading of bauxite, as this material travels on all conveyors prior to reaching the storage facility.

Schwalb that maintenance of loading equipment is covered, decedent's duties in this case are analogous to those of claimant Caputo, rather than to those of the truck driver who moved the goods on their landward journey. Accordingly, we hold that the administrative law judge erred in stating that the loading process ended once the bauxite left Conveyor A, and consistent with *Schwalb*, *Caputo* and *Garmon*, we hold that the loading process did not end until the raw material reached the storage facility.

We next address whether decedent spent a sufficient amount of his time engaged in maintenance of the conveyor belts, as employer contends that any time decedent spent in this activity is legally insufficient to confer coverage. *See generally King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983). While *Caputo* states that only "some" of an employee's time need be spent in covered activities to confer status, those activities must be more than merely episodic. An "episodic" activity is one which is "discretionary or extraordinary" as opposed to one which is "a regular portion of the overall tasks to which a claimant may be assigned. . . ." *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984); *see also McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). In *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732, an employee who spent 2.5 to five percent of his work time unloading ships without assistance and "some" additional time with assistance was held covered by the Act under the "some of the time" test of *Caputo*. In *McGoey*, the Board held that an employee who spent three to five percent of his time supervising the unloading of ships "spent at least some of his time engaged in the unloading process." *McGoey*, 30 BRBS 239. Moreover, the claimant was covered because this activity, while infrequent, was nonetheless a non-discretionary, regular portion of his job. *Id.; see generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). Similarly, in *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997), the Board held that the administra-

tive law judge's finding that the claimant worked one to two percent of his time in either ship repair or cargo handling was sufficient to establish the claimant's maritime status. Specifically, the Board held that these duties "were a regular portion of the overall task to which claimant could be, and actually was, assigned" and were not too episodic to confer status simply because of their infrequency. *Lewis*, 31 BRBS at 40-41; *see generally Lennon*, 20 F.3d at 660-661, 28 BRBS at 24 (CRT).

Decedent's job description was broad, encompassing service on "all types of equipment," and the administrative law judge noted Mr. Hartwell's testimony that employees with decedent's job classification could spend about one percent of their work repairing and maintaining the conveyor belts. Although the maintenance of the conveyor belts was infrequent pursuant to the credited testimony of Mr. Hartwell, this work nevertheless confers coverage under the Act because it was a regular, non-discretionary part of the job. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT). As the administrative law judge found that decedent could have been and actually was assigned to work on the bauxite conveyor about one percent of his time, Decision and Order at 7, we reverse his conclusion that such work was not covered employment.[8] *Lewis*, 31 BRBS at 40-41.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated. The case is remanded to the administrative law judge for consideration of the remaining issues raised by the parties.

SO ORDERED.

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[6] Because we conclude that decedent's work on employer's bauxite conveyor system constitutes covered employment, we need not address claimant's contentions regarding alleged work performed on the alumina or liquid caustic docks.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals Judge

APPENDIX D

Date: Oct. 3, 1996

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 300, Commerce Plaza
603 Pilot House Drive
Newport News, Virginia 23606

Case No.: 95-LHC-2055
OWCP No.: 6-158747

In the Matter of
ESTHER JONES
(Widow of Charlie Jones, Jr.),
Claimant,
v.
ALCOA,
Employer.

BEFORE: Richard K. Malamphy, Administrative Law Judge.

DECISION AND ORDER—DENYING BENEFITS BASED ON A LACK OF STATUS UNDER SECTION 2(3) OF THE ACT

This proceeding arises from a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended 33 U.S.C. 901 *et seq.*

A formal hearing was held, in Mobile, Alabama, on December 6, 1995, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the

arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

PRELIMINARY MATTERS

At the hearing, CX 1-28, EX 1-14, and JX 1 and 2 were entered into the record. CX 24, the transcript of a January 1996 deposition of Dr. Lorino, was submitted post-hearing.

No other exhibits have been submitted since the hearing in December 1995.

STIPULATIONS [1]

The parties have stipulated to the following:

1. From 1972 through 1980, Charlie Jones worked for Alcoa as a millwright welder and later as a general mechanic.
2. The Alcoa plant sits on the Mobile River, which is a navigable waterway.

ISSUES

1. Jurisdiction under the Longshore and Harbor Workers' Compensation Act;
   A. Situs
   B. Status
2. Whether Mr. Jones had asbestosis;
3. Whether asbestosis, if present, is related to asbestos exposure with Alcoa;
4. Whether asbestosis played a part in the fatal lung cancer; and

---

[1] The following abbreviations will be used as citations to the record:

EX—Employer's Exhibits;
CX—Claimant's Exhibits;
JX—Joint Exhibits; and
TR—Transcript of the hearing.

5. Whether Alcoa is entitled to relief under Section 8(f) of the Act.

JURISDICTION UNDER THE ACT

In order for a claimant to be eligible for benefits, the LHWCA, as it was amended in 1972, requires an injured worker to qualify under both a situs test and a status test. *Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). That is, the injury must occur upon the navigable waters of the United States as defined by the Act, and the claimant must have the status of an employee as defined in the Act.

Prior to the 1972 Amendment of the Act, a worker injured upon navigable waters was covered by the Act without an inquiry into what he was doing at the time of his injury. A Longshore or harbor worker injured on the landward side of the dock, however, could not collect LHWCA benefits, and was left with state workers' compensation benefits as his sole remedy. The 1972 Amendment added the status test, extending LHWCA coverage to "maritime employees" who perform their duties on land areas adjoining the navigable waters. *See* 33 U.S.C. § 902(3). Maritime workers were thus permitted to collect under the LHWCA even if they were injured on land, so long as they satisfied the following two part "status and situs" test:

> (1) *Status*—the worker must be a maritime employee, such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. *See* 33 U.S.C. § 902(3).
>
> (2) *Situs*—the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal building, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." *See* 33 U.S.C. § 903(a).

The Supreme Court held in 1983 that Congress did not intend to withdraw any coverage when it passed the 1972 Amendment, which added the status requirement and expanded the situs definition. Therefore, any worker injured on navigable waters could claim under the LHCWA regardless of whether he met the statute's "status requirement of being a 'maritime employee.'" *Director, Office of Workers' Compensation Programs v. Perini N. River Assoc.*, 459 U.S. 297 (1983).

Thus, if a worker is injured on a navigable water situs, he need only show that he works for a maritime employer in order to be eligible for LHWCA benefits. If the same worker is injured, instead, on an adjoining dock, pier, wharf, dry dock or loading area, he must also prove that his particular job is of a "traditionally maritime" status; or connected to ship-loading, shipbuilding, ship-repairing, etc., to claim LHWCA eligibility.

In *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989), the Supreme Court reiterated its holding from *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), that land-based work may constitute maritime employment, and accordingly, be subject to the jurisdiction of the LHWCA, if the employee was involved in the essential or integral elements of the loading or unloading process. *Schwalb*, 493 U.S. at 46; *see also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

Situs has not been contested in this case as the "alleged injury" occurred while the Claimant was working at a site bordering on a navigable waterway.

The Claimant focuses on the testimony of Ray Hartwell, the former plant manager, in arguing that the status requirement has been met. It is contended that Alcoa had three areas which were Longshore Act covered operations and these were the bauxite conveyors, the alumina dock, and the caustic dock. Reportedly, Mr. Jones could be assigned to these areas, and he actually worked in each of these areas.

The Claimant states that the statements of Messrs. Simon, House, and Howard support this contention. In addition to the U. S. Supreme Court cases mentioned previously, counsel cites *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611 (11th Cir. 1990), *Boudlouche v. Howard Trucking Company, Inc.*, 632 F.2d 1346 (5th Cir. 1980), and *Garmon v. Alcoa*, 28 BRBS 46 (1994).

The Employer states that:

> Claimant's case relies heavily on testimony that Decedent was employed as a millwright at Alcoa and, as such, could be required to maintain various conveyor systems used to transport bauxite throughout the manufacturing process at Alcoa. Apparently, Claimant contends this employment was an integral part of vessel loading or unloading. The Employer argues that the occasional work with respect to the Alcoa conveyor system does not support a finding of jurisdiction under the Act. As a millwright, while Decedent could have performed repairs to the Alcoa conveyors on a sporadic basis, this was not regular employment and certainly not integral to ongoing vessel loading or unloading operations.

The Employer states that:

> No Alcoa personnel were used to operate, service, or maintain the initial conveyor system employed by the Alabama State Docks. Alcoa personnel would only be involved with repairs to the Alcoa conveyors which were used to move bauxite in overland transportation once vessel discharge had been completed by the State Docks. Alcoa personnel may also be involved in maintenance of the barge loading facility and caustic dock on Alcoa premises. There was no evidence that Decedent worked on the caustic dock or the barge loading system.

At the hearing, Ray Hartwell, Jr., testified that he was employed at Alcoa's Mobile works from July 1945 to

February 1965, from September 1968 to October 1975, and from November 1978 until July 1995. (The major portion of the Alcoa plant was shut down in March 1982, and it was dismantled in 1985.) Mr. Hartwell, a former plant manager, described the facility and stated that vessels off loaded materials at the Alabama State Docks, adjacent to the Alcoa site.

If bauxite was destined for Alcoa, it was placed on conveyor "A" at the state docks and delivered to conveyor "B" which was primarily on Alcoa property. Conveyor "A" was eight feet above conveyor "B" and material dropped from A to B. Material from conveyor "B" was delivered to conveyor "C" where it was transferred to building 20 or building 22 where the bulk was then stored.

Buildings 20 and 22 had holes in the floor where bauxite could be dropped onto another conveyor for delivery to the grinding room. Mr. Hartwell testified that the State Docks also ran conveyor "A" in the opposite direction to unload materials for other customers.

Mr. Jones was considered to be a millright welder until 1978, and then this designation was changed to general mechanic. Mr. Hartwell testified that a millright welder spent less than one percent of his time in repairing conveyor systems. A general mechanic could spend up to two percent of his day involved in repairs to the caustic dock or the alumina dock. A 48-inch conveyor belt delivered material from the alumina silo to barges at the alumina dock. (TR 29-78)

Reginald House testified at the hearing that he worked at the plant from 1966 until 1982, and that he had been a millright helper and a general mechanic. Mr. House indicated that he had changed conveyor rollers, adjusted belts, and oiled rollers. (TR 82; CX 22)

In December 1995, depositions were taken of Henry Simon and Eddie Howard, Jr. (JX 1 and JX 2, respectively). See CX 25 and CX 26.

In *Garmon v. Alcoa*, 28 BRBS 28 (1994), the Board concurred that Mr. Garmon's bulldozing activities at the Mobile plant involved the movement of bauxite as part of the process of manufacturing aluminum, rather than as a part of the process of unloading bauxite from a vessel.

However, the Board remanded *Garmon, supra*, to consider testimony regarding the time he spent removing debris from the conveyor belts and placing on those belts the bauxite which had fallen from them. The Supreme Court has held that the status test focuses on the claimant's overall duties; thus, an employee is covered under the Act if he spends "at least some" of his time in loading and unloading. The Board indicated that the administrative law judge should determine whether the testimony establishes that claimant performed work on the conveyor belts which constituted part of the unloading process and which is covered under the Act.

The Benefits Review Board stated that in this case, however, the unloading process is complete when the bauxite is received for storage. It is not stored for further transhipment, but has reached its consignee and is stored to await use in the manufacturing process.

The record, at this time, indicates that neither an administrative law judge nor the Benefits Review Board has issued a subsequent decision in the case of *Garmon v. Alcoa.*

Mrs. Jones argues that her husband's maintenance of conveyor "B" meets the status requirement under the Longshore Act. Conveyor "A" is owned, operated, and maintained by the Port. Conveyor "A" was not attached to "B", and the former merely spilled material onto the latter for delivery to Alcoa storage area.

It is clear that Alcoa is not involved in the building or in the repairing of ships. Mr. Hartwell did testify that employees with Mr. Jones' job designation could spend about one percent of work time repairing conveyor "B".

There has been no suggestion in this case that Mr. Jones ever worked on the caustic dock or the alumina dock.

In *Northeast Marine Terminal Co. Inc. v. Caputo*, 432 U.S. 249 (1977), the Supreme Court stated that the Longshore Act covered workers who were involved in the essential elements of unloading a vessel-taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area.

The Supreme Court noted in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), that persons moving cargo directly from ship to land transportation are engaged in maritime employment. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

In *Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989), the Supreme Court stated that:

> Employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship.

In this case, there is no allegation that Mr. Jones ever worked on port authority machinery or was required to be on port property. Mr. Jones may have spent about one percent of his time repairing and maintaining conveyor "B" which belonged to Alcoa and was primarily on Alcoa property.

When bauxite spilled from conveyor "A" to conveyor "B", the bauxite was now in the possession of the ultimate user. Alcoa did not store and resell bauxite, but performed a manufacturing process that turned the bauxite into alumina.

The undersigned concludes that Mr. Jones' duties were not an integral part of vessel loading or unloading. In *Caputo, supra,* the Court stated that employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime commerce are not covered.

The port used conveyor "A" for functions which were not limited to the delivery of bauxite to Alcoa. For the above reasons, this administrative law judge finds that Mr. Jones' job was analogous to a truck driver as defined in *Caputo.*

Therefore, as Mr. Jones does not meet the definition of status under Section 2(3) of the Act, other considerations are moot in this case.

ORDER

The claim for death benefits under Section 9 of the Longshore and Harbor Workers' Compensation Act is DENIED.

SO ORDERED

/s/ Richard K. Malamphy
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/dlh
Newport News, Virginia

(2)

Supreme Court, U.S.
FILED
APR 12 1999
CLERK

No. 98-1276

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALUMINUM COMPANY OF AMERICA, PETITIONER

v.

ESTHER JONES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
GARY K. STEARMAN
Attorney
Department of Labor
Washington, D.C. 20210

1498

QUESTION PRESENTED

Whether an order of the Benefits Review Board that resolves one issue and remands to an administrative law judge for resolution of the remaining issues is a "final order" that may be reviewed by a court of appeals under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1276

ALUMINUM COMPANY OF AMERICA, PETITIONER

v.

ESTHER JONES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing the appeal for lack of jurisdiction (Pet. App. 3a) is not reported. The decision and order of the Benefits Review Board (Pet. App. 4a-15a) is reported at 31 Ben. Rev. Bd. Serv. (MB) 130. The decision and order of the administrative law judge (Pet. App. 16a-24a) is reported at 30 Ben. Rev. Bd. Serv. (MB) 741.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1998. A petition for rehearing was denied on November 12, 1998. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on February 9, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation for work-related injuries that result in the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered under the LHWCA, an injured employee must meet two requirements. The first, the status requirement, is that the employee was engaged in maritime employment. 33 U.S.C. 902(3). The second, the situs requirement, is that the injury occurred upon the navigable waters of the United States, defined by the LHWCA to include certain areas adjoining navigable waters. 33 U.S.C. 903(a).

Claims are decided by deputy commissioners appointed by the Secretary of Labor. 33 U.S.C. 919(a), 940 (now called district directors, see 20 C.F.R. 701.301(7)). Upon the request of an interested party, however, the deputy commissioner must order a hearing before an administrative law judge (ALJ) to decide a disputed claim. 33 U.S.C. 919(c) and (d). An ALJ's decision may be appealed to the Benefits Review Board, a tribunal within the Department of Labor. 33 U.S.C. 921(b). "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals." 33 U.S.C. 921(c).

2. From 1972 through 1980, petitioner Aluminum Company of America employed Charles Jones, Jr., deceased husband of respondent Esther Jones. Pet. App. 5a, 17a. Mr. Jones worked as a millwright welder and general mechanic at petitioner's plant on the Mobile River, a navigable waterway. *Id.* at 17a.

Among other job duties, Mr. Jones repaired and maintained petitioner's conveyor belts, which transported bauxite from a conveyor belt at the Alabama state docks to storage buildings in petitioner's dockside manufacturing plant. *Id.* at 7a-8a, 21a.

In 1994, Mrs. Jones filed a claim for death benefits under the LHWCA, 33 U.S.C. 909, which petitioner contested. Pet. 4. In the administrative proceeding before the ALJ, the parties disputed whether Mr. Jones satisfied the situs and status requirements; whether he had asbestosis; whether the asbestosis, if present, was related to asbestos exposure with petitioner; whether the asbestosis played a part in his fatal lung cancer; and whether petitioner was entitled to second injury relief under the Act, 33 U.S.C. 908(f). Pet. App. 17a-18a. Addressing the status issue only, the ALJ ruled that Mr. Jones did not satisfy the status requirement and denied the claim. *Id.* at 24a. Given his determination on that issue, the ALJ concluded that the "other considerations" in the case were "moot." *Ibid.*

Relying in large part on *Chesapeake & Ohio Railway* v. *Schwalb*, 493 U.S. 40 (1989), the Benefits Review Board reversed the ALJ's status determination and vacated his Decision and Order. Pet. App. 4a-15a. The Board remanded the case for resolution of the remaining factual and legal issues. *Id.* at 14a.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. In dismissing the petition for review, the court held that the Board's order remanding the case for further proceedings before the ALJ was not a final order, and, therefore, the court lacked jurisdiction to review the case under 33 U.S.C. 921(c). Pet. App. 3a. The court subsequently denied petitioner's request for rehearing. *Id.* at 1a.

ARGUMENT

The court of appeals correctly dismissed petitioner's appeal for lack of jurisdiction under 33 U.S.C. 921(c). That section permits court of appeals review of a "final order of the Board." The Board's remand order here did not end the dispute on the merits and thus is not a final order. The court's dismissal is consistent with a long line of court of appeals decisions and does not conflict with any decision of this Court. Further review is therefore not warranted.

1. The LHWCA provides that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals." 33 U.S.C. 921(c). The courts of appeals have consistently held that the LHWCA's finality requirement mirrors the finality requirement of 28 U.S.C. 1291, which provides that "[t]he courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts." See, *e.g.*, *Bish* v. *Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 1137 (9th Cir. 1989); *Director, OWCP* v. *Bath Iron Works Corp.*, 853 F.2d 11, 13 (1st Cir. 1988); *Youghiogheny & Ohio Coal Co.* v. *Baker*, 815 F.2d 422, 424 n.2 (6th Cir. 1987); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 400 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); *Freeman United Coal Mining Co.* v. *Director, OWCP*, 721 F.2d 629, 630 (7th Cir. 1983); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 590 F.2d 1267, 1268 (4th Cir. 1978); *Sun Shipbuilding & Dry Dock Co.* v. *Benefits Review Bd.*, 535 F.2d 758, 760 (3d Cir. 1976) (per curiam); see also *Redden* v. *Director, OWCP*, 825 F.2d 337, 338 (11th Cir. 1987) (per curiam); *WMATA* v. *Director, OWCP*, 824 F.2d 94, 95 (D.C. Cir. 1987) (per curiam).

"[A] decision is ordinarily considered final and appealable under § 1291 only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citations omitted); accord *Newpark Shipbuilding*, 723 F.2d at 400, 404, 406 (applying this "well-settled general rule" to LHWCA appeal). Conversely, "an order remanding a LHWCA claim to an ALJ for further findings is not, in general, immediately appealable." *Bath Iron Works*, 853 F.2d at 16.

As under Section 1291, the purpose of the finality requirement under the LHWCA is principally the "[a]voidance of the mischief of multiple appeals in a single litigation." *Bath Iron Works*, 853 F.2d at 13. Applying that finality principle, the courts of appeals have routinely dismissed petitions for review of Board orders remanding to the administrative law judge (ALJ) for further proceedings, because the orders "did not close out the case[s] * * * [but] contemplated that something further needed to be done." *Bath Iron Works*, 853 F.2d at 14.

2. a. Under Section 1291, a party may also immediately appeal from "a narrow class of collateral orders which * * * 'conclusively determine [a] disputed question' that is 'completely separate from the merits of the action,' 'effectively unreviewable on appeal from a final judgment,' and 'too important to be denied review.'" *Quackenbush*, 517 U.S. at 712 (citations omitted); see also *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Several courts of appeals have recognized that the collateral order exception could apply to an appeal of a Board order under Section 921(c) in an appropriate case. See *Bish*, 880 F.2d at 1137-1138; *Bath Iron Works*, 853 F.2d at 13 n.4, 15;

Redden, 825 F.2d at 338; *WMATA*, 824 F.2d at 95-96; *Newport News*, 590 F.2d at 1268; *Sun Shipbuilding*, 535 F.2d at 760-761. None has found immediate review appropriate, however, when issues of liability or damages remain to be decided, because "[a]dditional legal issues may arise on the remand to the administrative law judge, and no rights to review will be lost by [the appellant] if it must first litigate the [remand] issue[s] * * * before the administrative agency." *Sun Shipbuilding*, 535 F.2d at 761. In those cases, "[j]udicial economy, the interest underlying the finality rule, will be better served by postponing review" until all issues in the case have been adjudicated. *Ibid.*

b. The Board order here is a typical remand order that does not qualify for the collateral order exception. Although the Board decided the status issue, other issues that may be determinative of the outcome in the case (and thus render review of the status issue in the court of appeals unnecessary) remain unresolved and require fact-finding by the ALJ. Pet. App. 14a, 17a-18a, 24a. Also, the status issue is a fundamental part of the underlying claim—*i.e.*, whether LHWCA coverage is available—and is subject to review on appeal of the ALJ's final decision. See, *e.g.*, *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414 (1985) (reversing lower court status findings). The court below, therefore, correctly applied the well established rule for judging the finality of Board orders. Review of the court's application of that rule to the particular circumstances of this case is not warranted.

c. Contrary to the well established rule applied by the court of appeals, petitioner appears to advocate a standard that would permit court of appeals review of any interlocutory Board order that either conclusively resolves an important legal issue (Pet. 17) or is alleged

to exceed the Board's scope of review (*id.* at 15). Petitioner's standard would encompass most, if not all, Board remands. For example, almost any appeal may be framed as a contention that the Board exceeded the substantial evidence scope of review. See 33 U.S.C. 921(b)(3). As a result, the workload of the courts of appeals would greatly increase as they considered "appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995). More fundamentally, the recommended standard, lacking any meaningful limitation, conflicts with the plain language of the statute, which restricts review to "final" Board orders. See *Bath Iron Works*, 853 F.2d at 13 ("No matter how tantalizing a problem may be, a federal appellate court cannot scratch intellectual itches unless it has jurisdiction to reach them. And in this instance, we are persuaded that jurisdictional constraints foreclose us from inquiring, here and now, into the merits."); cf. *Bish*, 880 F.2d at 1138 ("pragmatic finality test" inapplicable to LHWCA because 33 U.S.C. 921(c) does not include analog to interlocutory review under 28 U.S.C. 1292(b)); *Newpark Shipbuilding*, 723 F.2d at 407 (overruling circuit precedent that had adopted pragmatic finality test in LHWCA case).

d. The cases that petitioner cites as conflicting with the decision of the court of appeals in this case (Pet. 14-15) are fully consistent with that decision. Both *Sea-Land Service, Inc.* v. *Director, OWCP*, 540 F.2d 629 (3d Cir. 1976), and *St. Louis Shipbuilding & Steel Co.* v. *Casteel*, 583 F.2d 876 (8th Cir. 1978), involved Board remand orders that required only the mechanical or ministerial computation of the amount of benefits due. See *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958) (judgment that specifies the means

for determining the amount of damages is final); *Goodwin* v. *United States*, 67 F.3d 149, 151 (8th Cir. 1995) ("judgment may be final 'if only ministerial tasks in determining damages remain'") (citation omitted); *Turner* v. *Orr*, 759 F.2d 817, 820 (11th Cir. 1985) (same), cert. denied, 478 U.S. 1020 (1986). By contrast, in LHWCA cases in which liability has been found but the amount of damages remains in dispute pending a remand, the courts of appeals have consistently denied review of the Board decision. See *WMATA*, 824 F.2d at 95; *Jacksonville Shipyards, Inc.* v. *Estate of Verderane*, 729 F.2d 726 (11th Cir. 1984) (per curiam); *Sun Shipbuilding*, 535 F.2d at 760. And, here, whether petitioner will ultimately be liable at all depends on further fact-finding on remand.

Mijangos v. *Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991) (cited by petitioner at Pet. 15-16), is not only consistent with the decision of the court of appeals in this case but demonstrates why judicial review of the status issue is unnecessary at this time. In *Mijangos*, the Board reversed an ALJ decision and remanded to the ALJ, who made additional findings of fact and issued a second order, which the Board then affirmed. On appeal, the Fifth Circuit reviewed the Board's remand, found it erroneous, and reinstated the ALJ's original decision. In so doing, the court of appeals reasoned that Section 10(c) of the Administrative Procedure Act (recodified at 5 U.S.C. 704), logic, and due process necessitate review of interlocutory Board orders when a party seeks judicial review after issuance of a final order. Accord *Van Dyke* v. *Missouri Mining, Inc.*, 78 F.3d 362, 365 (8th Cir. 1996); *Burns* v. *Director, OWCP*, 41 F.3d 1555, 1561-1562 (D.C. Cir. 1994); *Sun Shipbuilding*, 535 F.2d at 761 n.10. That rule comports with the more general one that "a party is

entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted); cf. 5 U.S.C. 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). The proposition that an interlocutory order may be reviewed following issuance of a final order and invocation of court of appeals jurisdiction is, of course, far different from the one petitioner urges here—that an interlocutory order may be reviewed before a final order has issued. Indeed, the fact that review of the Board's interlocutory decision on the status issue will be available once there is a final order in this case explains precisely why there is no need for immediate review of the interlocutory order.

3. This Court lacks jurisdiction over the other issues raised by petitioner because the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal. See *Steel Co.* v. *Citizens for a Better Env't*, 118 S. Ct. 1003, 1012-1013 (1998). Even if this Court had jurisdiction, the Court ordinarily would not pass in the first instance on issues that were not decided by the court of appeals. See, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993). In any event, the other issues that petitioner presses concern the Board's resolution of the status question (see Pet. i-ii, 17-22), which closely resembles the question this Court decided in *Chesapeake & Ohio Railway* v. *Schwalb*, 493 U.S. 40 (1989). The Court's review of that highly fact-bound question as applied to the facts of this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

GARY K. STEARMAN
Attorney
Department of Labor

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